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The Wall Street Journal _____
 The Christian Science Monitor _____
 New York Daily News _____
 USA Today _____
 The Chicago Tribune _____
UPI _____
 Date **4 APR 1988**

Revamped secrecy pledge comes under fire

By NEIL ROLAND

WASHINGTON (UPI) Administration officials have revised a controversial 7-year-old secrecy pledge for federal workers, but a key lawmaker says the new form is still illegal and hinders the flow of information to Congress.

Chairman Jack Brooks, D-Texas, of the House Government Operations Committee, assailed the new secrecy contracts for continuing to impose a life-long censorship requirement on employees in 21 federal agencies. The redrafted forms went into effect March 24.

(The administration's) revisions don't even address the major concerns of Congress about the contracts' devastating effects on the First Amendment," Brooks told United Press International.

The revised contracts are still in blatant violation of the moratorium placed on their use," he said.

A bill that Brooks helped prepare and President Reagan signed into law last December bars for nine months any secrecy pledge that "obstructs" an employee's right to communicate with Congress.

The administration introduced the pledge, known as Standard Form 4193, in 1981 to stanch leaks of information to Congress and the news media. Critics have charged that the form, and a second, more widely used pledge, have stifled employees' constitutional rights to free speech and have slowed the release of embarrassing information about administration problems.

The CIA, which administers the pledge, had obtained 240,000 signatures by 1985 from employees with access to intelligence sources and methods and has obtained thousands more since then, according to a General Accounting Office survey.

The new form, known as SF 4355, was submitted March 25 to a federal judge in Washington who is considering a lawsuit seeking to halt use of the pledges. The suit was filed by Brooks, six other congressmen and a federal employees association.

The revised form drops a clause barring release of "classifiable information" a phrase banned by the December law after critics had denounced it as "vague" and "chilling."

In place of this phrase, the new form has inserted the words, "information (that) is in the process of a classification determination."

An aide to Brooks termed this change "inadequate" because an employee may not know that some data are being processed for classification.

Many signatures on the scrapped pledge were obtained after the enactment of the December law. An aide to Brooks called forms signed since the ban "illegal" and said the administration should automatically void them.

But CIA official Edward Heinz, who runs the pledge program, said in a March 24 memo submitted to the court that the forms signed after the enactment of the law would remain in effect. Those pledges could be superseded only if a supervisor decided to re-submit the new form to an employee, he said.

TAB
B

SENSITIVE COMPARTMENTED INFORMATION (SCI) - AGREEMENT

An Agreement Between _____

and the United States

(Name - Printed or Typed)

1. Intending to be legally bound, I hereby accept the obligations contained in this Agreement in consideration of my being granted access to information or material protected within Special Access Programs, hereinafter referred to in this Agreement as Sensitive Compartmented Information (SCI). I have been advised that SCI involves or derives from intelligence sources or methods and is classified or is in the process of a classification determination under the standards of Executive Order 12356 or other Executive order or statute. I understand and accept that by being granted access to SCI, special confidence and trust shall be placed in me by the United States Government.

2. I hereby acknowledge that I have received a security indoctrination concerning the nature and protection of SCI, including the procedures to be followed in ascertaining whether other persons to whom I contemplate disclosing this information or material have been approved for access to it, and I understand these procedures. I understand that I may be required to sign subsequent agreements upon being granted access to different categories of SCI. I further understand that all my obligations under this Agreement continue to exist whether or not I am required to sign such subsequent agreements.

3. I have been advised that the unauthorized disclosure, unauthorized retention, or negligent handling of SCI by me could cause irreparable injury to the United States or be used to advantage by a foreign nation. I hereby agree that I will never divulge anything marked as SCI or that I know to be SCI to anyone who is not authorized to receive it without prior written authorization from the United States Government department or agency (hereinafter Department or Agency) that last authorized my access to SCI. I understand that it is my responsibility to consult with appropriate management authorities in the Department or Agency that last authorized my access to SCI, whether or not I am still employed by or associated with that Department or Agency or a contractor thereof, in order to ensure that I know whether information or material within my knowledge or control that I have reason to believe might be SCI, or related to or derived from SCI, is considered by such Department or Agency to be SCI. I further understand that I am also obligated by law and regulation not to disclose any classified information or material in an unauthorized fashion.

4. In consideration of being granted access to SCI and of being assigned or retained in a position of special confidence and trust requiring access to SCI, I hereby agree to submit for security review by the Department or Agency that last authorized my access to such information or material, any writing or other preparation in any form, including a work of fiction, that contains or purports to contain any SCI or description of activities that produce or relate to SCI or that I have reason to believe are derived from SCI, that I contemplate disclosing to any person not authorized to have access to SCI or that I have prepared for public disclosure. I understand and agree that my obligation to submit such preparations for review applies during the course of my access to SCI and thereafter, and I agree to make any required submissions prior to discussing the preparation with, or showing it to, anyone who is not authorized to have access to SCI. I further agree that I will not disclose the contents of such preparation to any person not authorized to have access to SCI until I have received written authorization from the Department or Agency that last authorized my access to SCI that such disclosure is permitted.

5. I understand that the purpose of the review described in paragraph 4 is to give the United States a reasonable opportunity to determine whether the preparation submitted pursuant to paragraph 4 sets forth any SCI. I further understand that the Department or Agency to which I have made a submission will act upon it, coordinating within the Intelligence Community when appropriate, and make a response to me within a reasonable time, not to exceed 30 working days from date of receipt.

6. I have been advised that any breach of this Agreement may result in the termination of my access to SCI and removal from a position of special confidence and trust requiring such access, as well as the termination of my employment or other relationships with any Department or Agency that provides me with access to SCI. In addition, I have been advised that any unauthorized disclosure of SCI by me may constitute violations of United States criminal laws, including the provisions of Sections 793, 794, 798, and 952, Title 18, United States Code, and of Section 783(b), Title 50, United States Code. Nothing in this Agreement constitutes a waiver by the United States of the right to prosecute me for any statutory violation.

7. I understand that the United States Government may seek any remedy available to it to enforce this Agreement including, but not limited to, application for a court order prohibiting disclosure of information in breach of this Agreement. I have been advised that the action can be brought against me in any of the several appropriate United States District Courts where the United States Government may elect to file the action. Court costs and reasonable attorneys fees incurred by the United States Government may be assessed against me if I lose such action.

8. I understand that all information to which I may obtain access by signing this Agreement is now and will remain the property of the United States Government unless and until otherwise determined by an appropriate official or final ruling of a court of law. Subject to such determination, I do not now, nor will I ever, possess any right, interest, title, or claim whatsoever to such information. I agree that I shall return all materials that may have come into my possession or for which I am responsible because of such access, upon demand by an authorized representative of the United States Government or upon the conclusion of my employment or other relationship with the United States Government entity providing me access to such materials. If I do not return such materials upon request, I understand this may be a violation of Section 793, Title 18, United States Code.

9. Unless and until I am released in writing by an authorized representative of the Department or Agency that last provided me with access to SCI, I understand that all conditions and obligations imposed upon me by this Agreement apply during the time I am granted access to SCI, and at all times thereafter.

10. Each provision of this Agreement is severable. If a court should find any provision of this Agreement to be unenforceable, all other provisions of this Agreement shall remain in full force and effect. This Agreement concerns SCI and does not set forth such other conditions and obligations not related to SCI as may now or hereafter pertain to my employment by or assignment or relationship with the Department or Agency.

11. I have read this Agreement carefully and my questions, if any, have been answered to my satisfaction. I acknowledge that the briefing officer has made available Sections 793, 794, 798, and 952 of Title 18, United States Code, and Section 783(b) of Title 50, United States Code, and Executive Order 12356, as amended, so that I may read them at this time, if I so choose.

FORM
3/78

4355

(Replaces Form 4192
which is obsolete and
will not be used)

terms of this Agreement.

13. This Agreement shall be interpreted under and in conformance with the law of the United States.

14. I make this Agreement without any mental reservation or purpose of evasion.

SIGNATURE _____

DATE _____

The execution of this Agreement was witnessed by the undersigned who accepted it on behalf of the United States Government as a prior condition of access to Sensitive Compartmented Information.

WITNESS and ACCEPTANCE: _____

SIGNATURE _____

DATE _____

SECURITY BRIEFING ACKNOWLEDGMENT

I hereby acknowledge that I was briefed on the following SCI Special Access Program(s).

(Special Access Programs by Initials Only)

Signature of Individual Briefed _____

Date Briefed _____

Printed or Typed Name _____

Social Security Number (See Notice Below) _____

Organization (Name and Address) _____

I certify that the above SCI access(es) were approved in accordance with relevant SCI procedures and that the briefing presented by me on the above date was also in accordance therewith.

Signature of Briefing Officer _____

Social Security Number (See Notice Below) _____

Printed or Typed Name _____

Organization (Name and Address) _____

SECURITY DEBRIEFING ACKNOWLEDGMENT

Having been reminded of my continuing obligation to comply with the terms of this Agreement, I hereby acknowledge that I was debriefed on the following SCI Special Access Program(s):

(Special Access Programs by Initials Only)

Signature of Individual Debriefed _____

Date Debriefed _____

Printed or Typed Name _____

Social Security Number (See Notice Below) _____

Organization (Name and Address) _____

I certify that the debriefing presented by me on the above date was in accordance with relevant SCI procedures.

Signature of Debriefing Officer _____

Social Security Number (See Notice Below) _____

Printed or Typed Name _____

Organization (Name and Address) _____

NOTICE: The Privacy Act, 5 U.S.C. 522a, requires that federal agencies inform individuals, at the time information is solicited from them, whether the disclosure is mandatory or voluntary, by what authority such information is solicited, and what uses will be made of the information. You are hereby advised that authority for soliciting your Social Security Account Number (SSN) is Executive Order 9397. Your SSN will be used to identify you precisely when it is necessary to 1) certify that you have access to the information indicated above, 2) determine that your access to the information indicated has terminated, or 3) certify that you have witnessed a briefing or debriefing. Although disclosure of your SSN is not mandatory, your failure to do so may impede such certifications or determinations.

TAB
C

SENSITIVE COMPARTMENTED INFORMATION NONDISCLOSURE AGREEMENT

An Agreement Between _____ and the United States
(Name - Printed or Typed)

1. Intending to be legally bound, I hereby accept the obligations contained in this Agreement in consideration of my being granted access to information protected within Special Access Programs, hereinafter referred to in this Agreement as Sensitive Compartmented Information (SCI). I have been advised that SCI involves or derives from intelligence sources or methods and is classified or classifiable under the standards of Executive Order 12065 or other Executive order or statute. I understand and accept that by being granted access to SCI, special confidence and trust shall be placed in me by the United States Government.

2. I hereby acknowledge that I have received a security indoctrination concerning the nature and protection of SCI, including the procedures to be followed in ascertaining whether other persons to whom I contemplate disclosing this information have been approved for access to it, and I understand these procedures. I understand that I may be required to sign subsequent agreements upon being granted access to different categories of SCI. I further understand that all my obligations under this Agreement continue to exist whether or not I am required to sign such subsequent agreements.

3. I have been advised that direct or indirect unauthorized disclosure, unauthorized retention, or negligent handling of SCI by me could cause irreparable injury to the United States or be used to advantage by a foreign nation. I hereby agree that I will never divulge such information to anyone who is not authorized to receive it without prior written authorization from the United States Government department or agency (hereinafter Department or Agency) that last authorized my access to SCI. I further understand that I am obligated by law and regulation not to disclose any classified information in an unauthorized fashion.

4. In consideration of being granted access to SCI and of being assigned or retained in a position of special confidence and trust requiring access to SCI, I hereby agree to submit for security review by the Department or Agency that last authorized my access to such information, all information or materials, including works of fiction, which contain or purport to contain any SCI or description of activities that produce or relate to SCI or that I have reason to believe are derived from SCI, that I contemplate disclosing to any person not authorized to have access to SCI or that I have prepared for public disclosure. I understand and agree that my obligation to submit such information and materials for review applies during the course of my access to SCI and thereafter, and I agree to make any required submissions prior to discussing the information or materials with, or showing them to, anyone who is not authorized to have access to SCI. I further agree that I will not disclose such information or materials to any person not authorized to have access to SCI until I have received written authorization from the Department or Agency that last authorized my access to SCI that such disclosure is permitted.

5. I understand that the purpose of the review described in paragraph 4 is to give the United States a reasonable opportunity to determine whether the information or materials submitted pursuant to paragraph 4 set forth any SCI. I further understand that the Department or Agency to which I have submitted materials will act upon them, coordinating within the Intelligence Community when appropriate, and make a response to me within a reasonable time, not to exceed 30 working days from date of receipt.

6. I have been advised that any breach of this Agreement may result in the termination of my access to SCI and retention in a position of special confidence and trust requiring such access, as well as the termination of my employment or other relationships with any Department or Agency that provides me with access to SCI. In addition, I have been advised that any unauthorized disclosure of SCI by me may constitute violations of United States criminal laws, including the provisions of Sections 793, 794, 798, and 952, Title 18, United States Code, and of Section 783(b), Title 50, United States Code. Nothing in this Agreement constitutes a waiver by the United States of the right to prosecute me for any statutory violation.

7. I understand that the United States Government may seek any remedy available to it to enforce this Agreement including, but not limited to, application for a court order prohibiting disclosure of information in breach of this Agreement. I have been advised that the action can be brought against me in any of the several appropriate United States District Courts where the United States Government may elect to file the action. Court costs and reasonable attorneys fees incurred by the United States Government may be assessed against me if I lose such action.

8. I understand that all information to which I may obtain access by signing this Agreement is now and will forever remain the property of the United States Government. I do not now, nor will I ever, possess any right, interest, title, or claim whatsoever to such information. I agree that I shall return all materials, which may have come into my possession or for which I am responsible because of such access, upon demand by an authorized representative of the United States Government or upon the conclusion of my employment or other relationship with the United States Government entity providing me access to such materials. If I do not return such materials upon request, I understand this may be a violation of Section 793, Title 18, United States Code, a United States criminal law.

9. Unless and until I am released in writing by an authorized representative of the Department or Agency that last provided me with access to SCI, I understand that all conditions and obligations imposed upon me by this Agreement apply during the time I am granted access to SCI, and at all times thereafter.

10. Each provision of this Agreement is severable. If a court should find any provision of this Agreement to be unenforceable, all other provisions of this Agreement shall remain in full force and effect. This Agreement concerns SCI and does not set forth such other conditions and obligations not related to SCI as may now or hereafter pertain to my employment by or assignment or relationship with the Department or Agency.

11. I have read this Agreement carefully and my questions, if any, have been answered to my satisfaction. I acknowledge that the briefing officer has made available Sections 793, 794, 798, and 952 of Title 18, United States Code, and Section 783(b) of Title 50, United States Code, and Executive Order 12065, as amended, so that I may read them at this time, if I so choose.

12. I hereby assign to the United States Government all rights, title and interest, and all royalties, remunerations, and emoluments that have resulted, will result, or may result from any disclosure, publication, or revelation not consistent with the terms of this Agreement.

13. I make this Agreement without any mental reservation or purpose of evasion.

SIGNATURE _____

DATE _____

The execution of this Agreement was witnessed by the undersigned who accepted it on behalf of the United States Government as a prior condition of access to Sensitive Compartmented Information.

WITNESS and ACCEPTANCE: _____

SIGNATURE _____

DATE _____

SECURITY BRIEFING ACKNOWLEDGMENT

I hereby acknowledge that I was briefed on the following SCI Special Access Program(s):

(Special Access Programs by Initials Only)

Signature of Individual Briefed _____

Date Briefed _____

Printed or Typed Name _____

Social Security Number (See Notice Below) _____

Organization (Name and Address) _____

I certify that the above SCI access(es) were approved in accordance with relevant SCI procedures and that the briefing presented by me on the above date was also in accordance therewith.

Signature of Briefing Officer _____

Printed or Typed Name _____

Organization (Name and Address) _____

Social Security Number (See Notice Below) _____

* * * * *

SECURITY DEBRIEFING ACKNOWLEDGMENT

Having been reminded of my continuing obligation to comply with the terms of this Agreement, I hereby acknowledge that I was debriefed on the following SCI Special Access Program(s):

(Special Access Programs by Initials Only)

Signature of Individual Debriefed _____

Date Debriefed _____

Printed or Typed Name _____

Social Security Number (See Notice Below) _____

Organization (Name and Address) _____

I certify that the debriefing presented by me on the above date was in accordance with relevant SCI procedures.

Signature of Debriefing Officer _____

Printed or Typed Name _____

Organization (Name and Address) _____

Social Security Number (See Notice Below) _____

NOTICE: The Privacy Act, 5 U.S.C. 522a, requires that federal agencies inform individuals, at the time information is solicited from them, whether the disclosure is mandatory or voluntary, by what authority such information is solicited, and what uses will be made of the information. You are hereby advised that authority for soliciting your Social Security Account Number (SSN) is Executive Order 9397. Your SSN will be used to identify you precisely when it is necessary to 1) certify that you have access to the information indicated above, 2) determine that your access to the information

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D

to the foreign tour of duty) within the United States, its territories or possessions, the Commonwealth of Puerto Rico, or such areas and installations in the Republic of Panama"; and

(B) by adding at the end thereof the following new sentence: "Reimbursement of expenses prescribed under this paragraph in connection with transfers from a post of duty located outside the United States, its territories or possessions, the Commonwealth of Puerto Rico, or the areas and installations in the Republic of Panama made available to the United States pursuant to the Panama Canal Treaty of 1977 and related agreements (as described in section 3(a) of the Panama Canal Act of 1979), shall not be allowed for any sale or settlement of unexpired lease or purchase transaction that occurs prior to official notification that the employee's return to the United States would be to an official station other than the official station from which the employee was transferred when assigned to the foreign post of duty."

(2) **EFFECTIVE DATE.**—The amendments made by paragraph (2) shall be applicable with respect to any employee transferred to or from a post of duty on or after 60 days after the date of enactment of this section.

(b) **FUNDS FOR IMPLEMENTATION.**—The amendments made by subsection (a) shall be carried out by agencies by the use of funds appropriated or otherwise available for the administrative expenses of each of such respective agencies. The amendments made by such subsections do not authorize the appropriation of funds in amounts exceeding the sums already authorized to be appropriated for such agencies.

SEC. 629. Notwithstanding 31 U.S.C. 1346 or section 607 of this Act, funds made available for fiscal year 1988 by this or any other Act shall be available for the interagency funding of national security and emergency preparedness telecommunications initiatives which benefit multiple Federal departments, agencies, or entities, as provided in Executive order Number 12472 (April 3, 1984).

EMPLOYEE DISCLOSURE AGREEMENTS

SEC. 630. No funds appropriated in this or any other Act for fiscal year 1988 may be used to implement or enforce the agreements in Standard Forms 189 and 4193 of the Government or any other non-disclosure policy, form or agreement if such policy, form or agreement:

(1) concerns information other than that specifically marked as classified; or, unmarked but known by the employee to be classified; or, unclassified but known by the employee to be in the process of a classification determination;

(2) contains the terms "classifiable";

(3) directly or indirectly obstructs, by requirement of prior written authorization, limitation of authorized disclosure, or otherwise, the right of any individual to petition or communicate with Members of Congress in a secure manner as provided by the rules and procedures of the Congress;

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(4) interferes with the right of the Congress to obtain executive branch information in a secure manner as provided by the rules and procedures of the Congress;

(5) imposes any obligations or invokes any remedies inconsistent with statutory law:

Provided, That nothing in this section shall affect the enforcement of those aspects of such nondisclosure policy, form or agreement that do not fall within subsections (1)-(5) of this section

This Act may be cited as the "Treasury, Postal Service and General Government Appropriations Act, 1988".

And the Senate agree to the same.

Amendment numbered 15:

That the House recede from its disagreement to the amendment of the Senate numbered 15, and agree to the same with an amendment, as follows:

In lieu of the matter stricken and the matter inserted by said amendment, insert the following:

(n)(1) Upon the enactment of this resolution enrolled as a hand enrollment, the Clerk of the House of Representatives shall prepare a printed enrollment of this resolution as in the case of a bill or joint resolution to which sections 106 and 107 of title 1, United States Code, apply. Such enrollment shall be a correct enrollment of this resolution as enrolled in the hand enrollment.

(2) A printed enrollment prepared pursuant to subsection (n)(1) may, in order to conform to customary style for printed laws, include corrections in spelling, punctuation, indentation, type face, and type size and other necessary stylistic corrections to the hand enrollment. Such a printed enrollment shall include notations (in the margins or as otherwise appropriate) of all such corrections.

(3) A printed enrollment prepared pursuant to subsection (n)(1) shall be signed by the presiding officers of both Houses of Congress as a correct printing of the hand enrollment of this resolution and shall be transmitted to the President.

(4) Upon certification by the President that a printed enrollment transmitted pursuant to subsection (n)(3) is a correct printing of the hand enrollment of this resolution, such printed enrollment shall be considered for all purposes as the original enrollment of this resolution and as valid evidence of the enactment of this resolution.

(5) A printed enrollment certified by the President under subsection (n)(4) shall be transmitted to the Archivist of the United States, who shall preserve it with the hand enrollment. In preparing this resolution for publication in slip form and in the United States Statutes at Large pursuant to section 112 of title 1, United States Code, the Archivist of the United States shall use the printed enrollment certified by the President under subsection (n)(4) in lieu of the hand enrollment.

(6) As used in this section, the term "hand enrollment" means enrollment in a form other than the printed form required by sections 106 and 107 of title 1, United States Code, as authorized by the joint resolution entitled "Joint resolution authorizing the hand enrollment of the budget reconciliation bill and of the full-year continuing resolution for fiscal year 1988", approved December 1987 (H.J. Res. 426 of the 100th Congress).

TAB
E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES,

Plaintiff,

v.

UNITED STATES OF AMERICA,
et al.,

Defendants.

Civil Action No.
87-2284-OG

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, et al.,

Plaintiffs,

v.

STEVEN GARFINKEL, Director,
Information Security Oversight
Office, et al.,

Defendants.

Civil Action No.
87-2412-OG

AMERICAN FOREIGN SERVICE
ASSOCIATION, et al.,

Plaintiffs,

v.

STEVEN GARFINKEL, Director,
Information Security Oversight
Office, et al.,

Defendants.

Civil Action No.
88-0440-OG

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION TO DISMISS, IN OPPOSITION TO
MOTIONS FOR PRELIMINARY INJUNCTION, AND IN
OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

*Relevant pages of brief addressing
cross' access to classified*

while certainly not dispositive standing alone, the circumstances under which Section 630 was passed speaks volumes about the respective interests of the branches here. Neither House held hearings on this provision. It was, at the 11th hour, literally slipped into a continuing resolution of over 1000 pages, which had to be signed by the President on the eve of the 1987 Christmas recess to keep the government operating. What little legislative history there is to Section 630, and its lack of relationship to the rest of the Continuing Resolution, strongly suggest that very few members of Congress, other than the plaintiffs in AFSA who sponsored it, were even aware of the provision, let alone understood what it was designed to do. A holding that Congress, in so facile and offhanded a manner, can effectively undercut an evolution of 40 years of Presidential Executive Orders and national security directives promulgated pursuant to Article II is clearly not called for here.

To the extent the congressional plaintiffs claim a right to unimpeded access to classified or even "classifiable" information from Executive Branch "whistleblowers," a related constitutional doctrine comes into play. Since the time of Washington, Congress has recognized the President's authority to control access to national security information. Curtiss-Wright, 299 U.S. at 320 (President Washington's refusal to comply with a congressional request for documents relating to foreign affairs was "a refusal the wisdom of which was recognized by the House itself and has never since been doubted."). This doctrine of executive

privilege for national security information is well recognized in modern cases, see United States v. Nixon, 418 U.S. 683, 710 (1974); United States v. Reynolds, 345 U.S. 1 (1953), and applies vis-a-vis the Congress. United States v. AT&T, 567 F.2d 121, 129 (D.C. Cir. 1977).²⁰

The Executive Orders and NSDD 84 are, in part, delegations by the President to certain high level subordinates to control access to and disclosure of classified information. The secrecy agreements embodied in the forms at issue are mechanisms by which the President's power to assert executive privilege can be carried out. Questions regarding disclosure of national security information to Congress can be pushed up to the appropriate level

²⁰ In AT&T, supra, the defendant was in possession of certain national security documents that had been subpoenaed by a House committee. The United States sued to prevent AT&T from complying, citing potential damage to the government's intelligence interests. The court allowed the suit to proceed, noting that the Executive Branch should be no worse off than if it controlled the documents itself:

If the request letters were only in the hands of the Justice Department, it could have refused to comply with the legislative demand, citing Senate Select Committee. The fact that the request letters are available from AT&T as well as from the Justice Department does not make the legislative authority unreviewable in court, for AT&T could have refused to comply and insisted on an ultimate court decision to avoid prosecution. The fact that the Executive is not in a position to assert its claim of constitutional right by refusing to comply with a subpoena does not bar the challenge so long as members of the Subcommittee are not, themselves, made defendants in a suit to enjoin implementation of the subpoena.

Id. at 129 (footnote and citations omitted).

within the Executive Branch, even to the President himself. The notion, however, that any employee in the national security establishment is equipped to decide what can safely be disclosed has been rejected by the courts, See Snepp, 444 U.S. at 507-10, and bespeaks a lack of discipline that is inimical to any responsible program of protection of classified information. Id.; see also Sims, 471 U.S. at 170. With its subpoena authority and political powers, the Congress is hardly helpless in dealing with the President. But it cannot undermine the President's ability to prevent disclosures of classified information by his own Executive Branch employees by legislatively immunizing them from unauthorized end runs. Congress has legitimate tools to obtain the information it needs. Section 630 is not one of them.

Because Section 630 is directly targeted at an exercise of Presidential authority under Article II, embodying an Executive judgment that specific controls on classified information are needed in the interest of national security, and because Congress has not even purported to establish its own competing scheme governing such information, compelling the Executive to comply with that statute, beyond the actions the Executive has already taken to meet congressional concerns, would violate the constitutional separation of powers.

CONCLUSION

For the foregoing reasons, the Court should grant defendants' motion to dismiss, deny plaintiffs' motion for

summary judgment, and deny plaintiffs' motions for preliminary injunctive relief.

Respectfully submitted,

JOHN R. BOLTON
Assistant Attorney General

JAY B. STEPHENS
United States Attorney

David J. Anderson by WRI
DAVID J. ANDERSON

Vincent M. Garvey by WRI
VINCENT M. GARVEY

WM. Robert Irvin
WM. ROBERT IRVIN

Neal Dittersdorf by WRI
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Attorneys, Department of Justice
Civil Division, Room 3706
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Washington, D.C. 20530
Telephone: (202) 633-4960

Attorneys for Defendants.

CERTIFICATE OF SERVICE

I hereby certify that, on this 30th day of March, 1988, copies of the foregoing Motion To Dismiss and Defendants' Memorandum Of Points And Authorities In Support Of Motion To Dismiss, In Opposition To Motions For Preliminary Injunction, And In Opposition To Motion For Summary Judgment were served by messenger on:

H. Stephen Gordon, Esquire
Bruce Heppen, Esquire
Alice L. Bodley, Esquire
National Federation of Federal
Employees
1016 16th Street, N.W.
Suite 400
Washington, D.C. 20036

Mark Roth, Esquire
Staff Counsel
American Federation of
Government Employees, AFL-CIO
80 F Street, N.W.
Washington, D.C. 20001

Joseph B. Kennedy, Esquire
General Counsel
Government Accountability Project
25 E Street, N.W., Suite 700
Washington, DC. 20001

Patti A. Goldman
Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, DC 20036

and by DHL, prepaid, on:

Stuart A. Kirsch, Esquire
Staff Counsel
American Federation of
Government Employees, AFL-CIO
510 Plaza Drive, Suite 2510
College Park, Georgia 30349


WM. ROBERT IRVIN